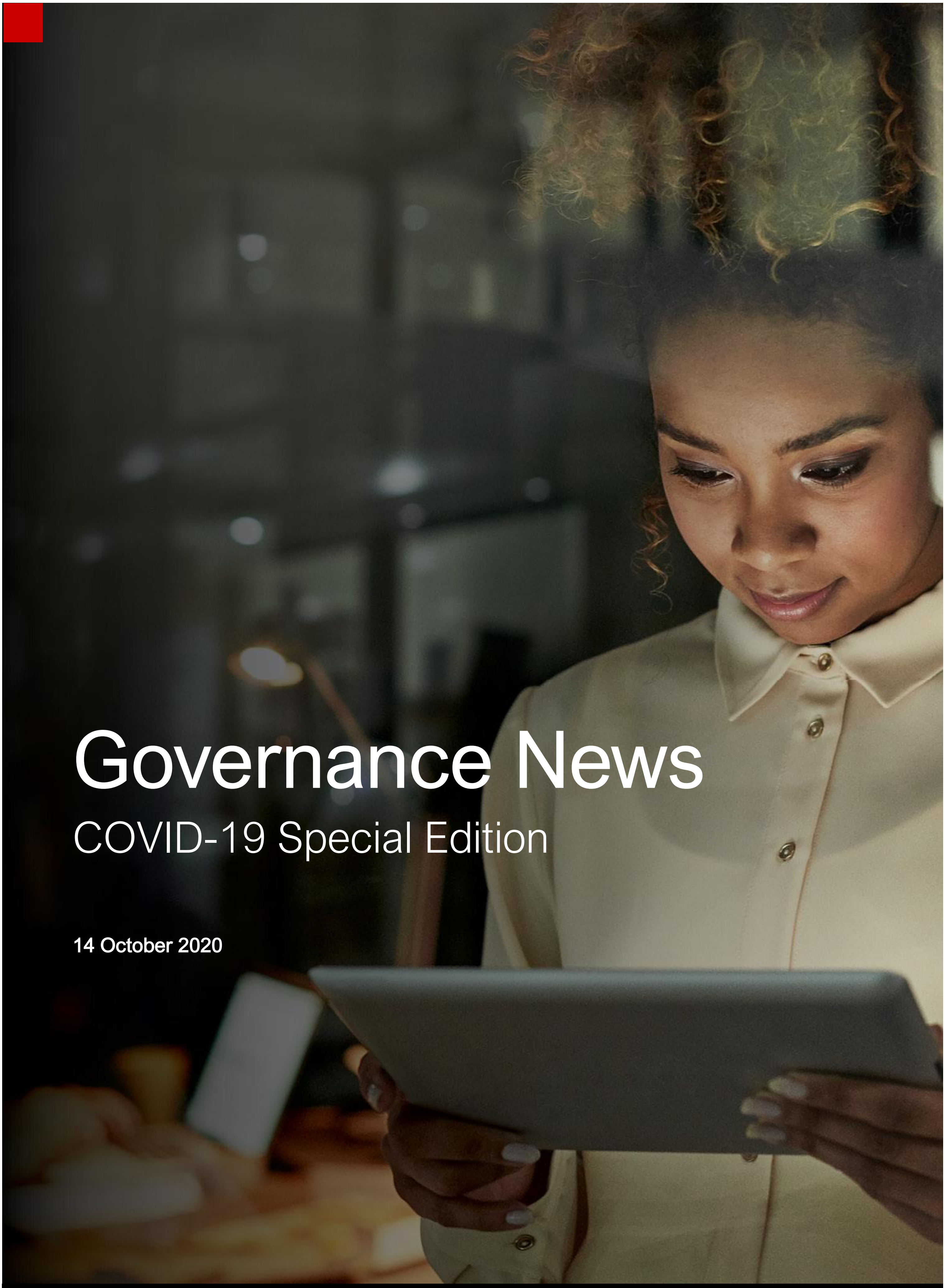

Governance News

COVID-19 Special Edition

14 October 2020

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Diversity

HESTA has launched a gender diversity campaign arguing that lack of gender diversity in leadership is a financial risk

HESTA has launched a campaign calling on all ASX 200 companies to take steps to ensure at least 40% of C-suite positions are held by women by 2030.

Announcing the initiative, HESTA CEO Debbie Blakey said that the campaign is being launched in light of the very slow progress that has been made toward achieving gender parity in leadership roles. Ms Blakey said,

> 'We see lack of gender diversity in leadership as a financial risk – companies that fail to consider 50% of the population for leadership positions risk missing out on the best people and the performance of the organisation will eventually suffer. That's why we're calling for all ASX200 companies to pledge support for 40% gender balance by 2030.'

Commitments

The 40:40 Vision Investor Statement outlines investor commitments and expectations for companies on gender diversity in executive teams.

Expectations of companies: The 40:40 Vision campaign calls on companies to commit to:

1. achieve gender balance (40:40:20) in executive leadership by 2030
2. announce medium and long term gender targets for 2023 and 2027
3. publicly disclose their plan for achieving gender diversity targets
4. report annually on progress towards achieving gender targets

Investor commitments

Investor signatories to the statement commit to:

- actively engage with companies on the gender diversity of their executive team and encourage companies to sign on to the 40:40 Vision
- hold companies to account for meeting their gender balance targets/commitments under the 40:40 Vision through engagement and, (possibly) through voting action (eg the statement commits signatories to consider voting against the reelection of the Chair where insufficient progress is being made toward achievement of the stated targets)

Investor support

The 40:40 Vision Investor Statement has eight inaugural signatories: Aberdeen Standard Investments, BlackRock Australia, Ellerston Capital, Fidelity International, First Sentier Investors, IFM Investors, Pendal Group and WaveStone Capital.

The campaign has the support of industry partners Chief Executive Women, the Australian Council of Superannuation Investors, 30% Club and the Workplace Gender Equality Agency.

The Association of Superannuation Funds of Australia (ASFA) has thrown its support behind the campaign and called on investors to support the initiative.

[Sources: HESTA media release 01/10/2020; 40:40 Vision Investor Statement; ASFA media release 01/10/2020]

Mercer finds that despite the fact that 80+% of Australian businesses report being focused on gender parity and pay equality, they're still falling short

Research by Mercer into gender diversity and inclusion (D&I) initiatives at Australian organisations concludes that despite professing to value and prioritise gender parity and pay equity, D&I initiatives efforts are falling short of achieving their objective in practice.

Below are some of the areas which Mercer identifies as areas for improvement.

- **No formal diversity strategy:** Though 84% of Australian organisations report that they are focused on improving gender diversity and inclusion, only 50% have a formal medium to long term diversity and inclusion strategy. Less than 50% of organisations have set clear targets for improving gender parity/pay equity. Mercer comments that the lack of strategy serves to undermine the effectiveness of D&I initiatives in practice because it makes effectiveness difficult to assess and improvements more difficult to formulate.
- **No formal process to address gender pay gaps/or an imperfect process:** Despite the fact that most organisations identify pay equity as part of their 'compensation philosophy', only 50% of organisations have a formal process to address unequal pay and less than 50% (42%) conduct pay equity analysis. Where pay gaps are identified 20% of companies do not take into account both base pay and variable pay when determining the appropriate increase.
- **Lack of sufficient board oversight:** In terms of active engagement on pay equity initiatives, HR typically takes the lead (95% of cases), only 32% of boards are actively engaged. Mercer suggests that pressure to increase board oversight of gender diversity/inclusion initiatives will continue to intensify going forward.
- **Lack of dedicated resources:** Though 72% of organisations reported that leadership is focused on improving gender diversity, only 40% of organisations have dedicated D&I staff in place and only 22% have a Chief Diversity and Inclusion officer. Mercer comments that the lack of dedicated resourcing impacts the implementation of D&I initiatives and also leads to a lack of focus/accountability for delivery of programs.

[Source: Consultancy.com.au media release 12/10/2020]

Please explain: US regulator asks Microsoft to explain why its recent diversity in leadership commitments do not constitute unlawful discrimination on the basis of race

Microsoft (which is a Federal contractor) has issued a statement announcing that the United States Department of Labor Office of Federal Contract Compliance Programs (OFCCP) has asked that it provide an explanation as to why its commitment to double the number of Black and African American people managers, senior individual contributors and senior leaders in its US workforce by 2025 and the measures being implemented to achieve this goal, do not constitute unlawful discrimination on the basis of race (contrary to Title VII of the Civil Rights Act).

The statement reiterates Microsoft's commitment to increasing leadership ethnic/racial diversity in line with previous public announcements on the basis that increasing diversity is in the best interests of the company and the community, and that this is entirely consistent with meeting legal requirements.

The statement reads,

> 'We have every confidence that Microsoft's diversity initiative complies fully with all US employment laws. We look forward to providing the OFCCP with this information and, if necessary, defending our approach…We hire and promote the most qualified person. And nothing we announced in June changes that. Instead, our continued focus is to work hard to consider and develop the broadest range of qualified candidates for opportunities…
>
> …We believe it is a core part of our mission to make our company, our community and our country a place where people of diverse views and backgrounds are welcomed and can thrive. We know that as a company and a country we have more work to do to expand opportunity. We look forward to helping the OFCCP understand the legality of our programs as we work towards a shared goal of promoting diversity in full conformity with federal law'.

Separately, the WSJ reports that Wells Fargo has also reportedly received a similar request and similarly has expressed the view that its commitments do not breach any legal obligation.

[Sources: Microsoft blog post 06/10/2020; [registration required] The WSJ 08/10/2020]

Background

The Department of Labor's request follows the release of a memorandum in September to the heads of executive branch agencies notifying of the President's directive that they 'cease and desist from using taxpayer dollars to fund…divisive, un-American propaganda training sessions'.

Ahead of more detailed guidance on implementing the President's direction, the memorandum asked that agencies immediately review their training programs to identify any program that teaches 'critical race theory', 'white privilege' or 'any other training or propaganda effort that teaches or suggests either 1) that the United States is an inherently racist or evil country or 2) that any race or ethnicity is inherently racist or evil'.

[Source: Memorandum for the heads of executive departments and agencies, 04/092020]

Women make up more than a third of all board members across the FTSE 350 for the first time

In 2016 the independent, government-sponsored Hampton-Alexander Review set a minimum 33% target for women on FTSE350 boards and in senior leadership two layers below the board.

The 'headline target' has been met, but there is still work to do…

- The UK Department for Business, Energy & Industrial Strategy (BEIS) has released a statement confirming that the Hampton-Alexander Review headline target for a third of FTSE 350 board positions to be women, has been met for the first time. This represents a 3.8% increase in the overall representation of women as compared with last year.
- However, taken individually, over four in ten (41%) of FTSE 350 boards have not yet reached the 33% female representation target.
- The data also shows that there are 18 FTSE 250 boards with only one female director, and one remaining all male board (down from 152 all male boards in 2011).

Voluntary approach is working

Commenting on the results overall, CEO of the Hampton Alexander Review Denise Wilson said that the results are proof that the voluntary approach to increasing diversity is working.

> 'Recognising the significant impact of the global COVID-19 pandemic on all business activities, it is encouraging

to see the number of women at the top of British business continue to increase. This confirms the UK's business-led voluntary approach is working and the benefits of diversity are being recognised, with business seeking more than ever those with fresh energy, new ideas and diverse perspectives'.

Business Secretary and the Investment Association have called on laggard companies to step up their efforts

- Business Secretary Alok Sharma has called on all companies to meet the 33% target by the end of December 2020 in the interests of 'building back better'. Mr Sharma said,

  > 'While I am pleased that the FTSE 350 as a whole has finally hit this historic landmark, more than 100 of the UK's top companies have failed to meet the target. Research shows that diverse leadership teams are more innovative and make better decisions. As the UK economy continues to recover from coronavirus, increasing representation of women on boards represents a golden opportunity not only to rebuild, but build back better'.

- Similarly, Investment Association CEO Chris Cummings called on companies to step up their efforts. Mr Cummings said,

  > 'On behalf of investors, I want to send a rallying cry to those companies that now is the time to take action and demonstrate real change. Diversity results in better decision-making and plays an essential role in a company's long-term success and investors expect companies, at a minimum, to meet the target set'.

Annual reporting open from November: The portal enabling companies to submit their gender ie the number of men and women on the Executive Committee and the Direct Reports to the Executive Committee will open on 2 November close on 30 November. The final review is due to be published in February 2021.

[Source: BEIS media release 22/09/2020]

Female board representation at the FRC is now at 40% (exceeding the 33% target), but more work is needed to increase female representation at ExCo level

The UK Financial Reporting Council (FRC) has issued its annual update on progress towards gender parity, in line with commitments under the Women In Finance Charter. According to the FRC's statement, progress has been made towards increasing female representation at board and senior manager levels, but more work is needed to increase representation at ExCo level.

- Women now account for 40% of board positions (up from 30% last year). This exceeds the FRC's target of 33% representation.
- 58.3% of senior managers (ExCo and Pay Level 6) are women up from 46.6% last year.

Looking at the ExCo exclusively, women account for 25% of roles (well short of the 33% target). The FRC states that it has implemented measures across the organisation – eg 'unconscious bias and active bystander training', coaching, mentoring and reverse mentoring to drive further progress.

[Source: FRC media release 05/10/2020]

In Brief | The FSC has released voluntary guidance (Guidance Note 38) setting out various suggested policy recommendations, processes and approaches to assist fund managers to improve gender balance in investment management teams

[Sources: FSC media release 12/10/2020; Guidance Note 38: Improving Gender Balance in Investment Teams]

Shareholder Activism

Shareholder activism Q3 2020: Activist Insight's latest report tracking global trends in activist activity has found that overall activity is well-down on 2019, though Asia is bucking the trend

Activist Insight has released its latest report tracking global trends in activist activity for the period 2017 to Q3 2020.

Some Interesting Findings

Global insights

- The report found that taken overall the number of companies publicly subjected to activist demands is at its lowest level since 2015. In Q3 2020, 652 companies have so far been targeted, down from 757 last year (for the same period).
- Looking at it by country, activity is down in the US, Canada, Europe and Australia:
  - In the US so far this year, 367 US based companies have been publicly subjected to activist demands, 45 fewer than was the case for the same period (Q3) in 2019.
  - In Canada, the number of Canada based companies publicly subjected to activist demands stands at 35 (down from 48 at Q3 2019).
  - In Europe the number of Europe based companies publicly subjected to activist demands stands at 101 (down from 133 in Q3 2019)
  - In Australia the number of Australia based companies publicly subjected to activist demands stands at 40 (down from 59 in Q3 2019
- Activity slightly increased in Asia: The total number of Asia-based companies publicly subjected to activist demands stands at 99 (up from 98 in Q3 2019). Japan based companies were the most targeted accounting for 67 of the 99 companies targeted so far.
- Globally, the most targeted sector so far this year is the industrials sector (18%), followed by the financial services (14%) and separately the 'consumer cyclical' sectors (14%) and the technology sector (12%).
- Globally, the largest companies (>$10bn market capitalisation) and separately small cap companies ($250m-$2bn market capitalisation) have been the most targeted in 2020 with companies in each category separately accounting for 26% of activist demands.

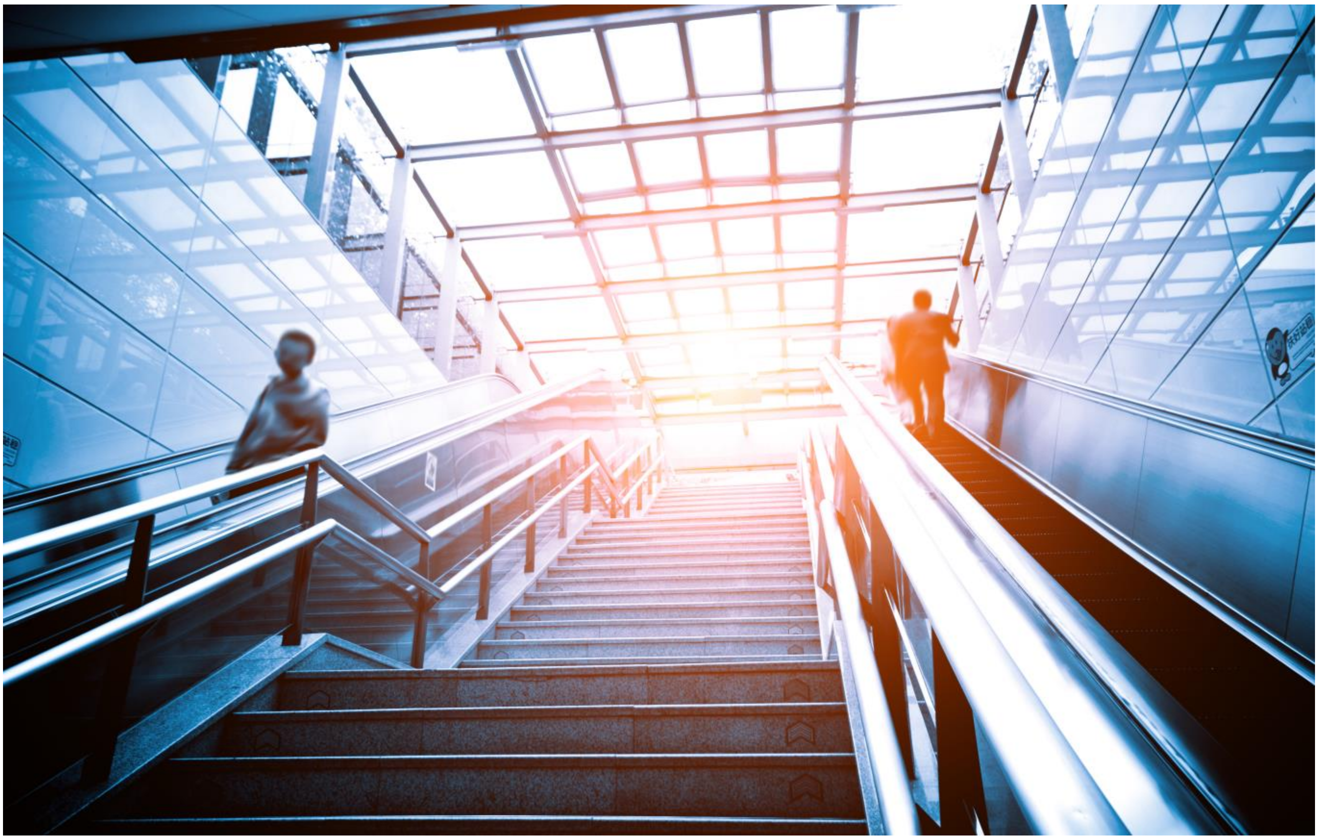
Australia

- So far this year, the number of Australia-based companies publicly subjected to activist demands stands at 40, a significant drop as compared with Q3 2019 (59 companies targeted) and, according to Activist Insight's report, the lowest level in recent years
- Basic materials is the most targeted sector (30%), followed by financial services (13%), energy (13%) and industrials (13%). Companies in the technology sector were targeted 10% of the time.
- In Australia, the smallest companies (companies in the nano cap category <%550m) have been the most targeted (68%) followed by small cap companies. Large cap companies (>$10bn market capitalisation) have not been targeted at all.
- In Australia, the majority of activist demands are board related (68% of activist demands are board related). Only 12% of demands relate to M&A/breakup and 10% are balance sheet related.
- The number of board seats won so far this year is 15, down from 37 at the same time (Q3) in 2019.

[Source: Activist Insight report: Shareholder Activism Q3 2020 YTD October 2020]

Evidence of impact: As You Sow has highlighted several examples of instances in which companies have changed their behaviour as a result of As You Sow's campaigns

In a recent email to subscribers, As you Sow highlighted several examples of instances in which their campaigns in North America during the recent proxy season have led to companies changing their behaviour.



For example:

- On the issue of racial equality/diversity: seven shareholder resolutions calling for companies to track and report on their diversity and inclusion programs were withdrawn after the companies agreed to publish annual diversity/inclusion reports.
- Sustainability reporting: Four resolutions calling on companies make disclosures under the Sustainable Accounting Standards Board (SASB) framework were successful: 55% at Phillips 66 on petrochemical plants in flood zones; 61% at Fastenal, 66% at O'Reilly Auto Parts, and 79% at Genuine Parts.
- Climate change:
  - Wells Fargo and Goldman Sachs have committed taking steps to assess methodologies for measuring their full carbon footprint, including from their loan portfolios.
  - Bank of America, Citibank, and Morgan Stanley have agreed to measure their financed emissions and disclose them as a first step toward setting greenhouse gas reduction goals.
  - Hertz has committed to work on strategies to advance the adoption of Electric Vehicles in its fleet.
  - JP Morgan and Goldman Sachs have announced policies to stop funding Arctic oil & gas projects, increase restrictions on coal funding, and increase funding for sustainable projects.

The full list of the outcomes of As You Sow's campaigns can be accessed via As You Sow's resolution tracker here.

[Source: As You Sow media release 07/10/2020]

ACCR withdrew its cultural heritage protection resolution at the request of the First Nation's Heritage Protection Alliance 24 hours prior to BHP's AGM

The Australasian Centre for Corporate Responsibility (ACCR) has issued a statement announcing the withdrawal of the shareholder resolution calling for cultural heritage sites to be protected (including by introducing a moratorium on the destruction of cultural heritage sites) 24 hours before BHP's AGM.

ACCR states that the proposal was withdrawn at the request of the First National Heritage Protection Alliance after a new agreement was negotiated between the Alliance and BHP.

ACCR states that under the agreement BHP has agreed to:

- 'Implement principles jointly developed with the Alliance to strengthen Free, Prior and Informed Consent in agreement making;
- Support national and state cultural heritage legislative reform that ensure FPIC in agreement making for Traditional Owners and Aboriginal Land Councils;
- Establish keeping places that are reflective of Traditional Owners' values and culture, that are a source of pride where artefacts can be stored and visited;
- Culture mapping; and
- PBC funding'.

Commenting on the withdrawal of the resolution, ACCR executive director Brynn O'Brien said

> 'The measures the First Nations Alliance have secured with BHP could not have happened without the interest of the investment sector and the communication of their expectations about companies' cultural heritage management.'

In a short statement, announcing the agreement, BHP said that it had reached joint agreement with the Alliance on a 'path forward to enhance the influence and voice of traditional owners in relation to heritage protection' including through agreement on a set of shared principles concerning Aboriginal Heritage in Australia'.

BHP states that the principles both:

- 'reaffirm BHP's commitment to Free, Prior and Informed Consent in agreement making. Together we agree regulatory regimes should respect and reflect these rights'
- 'reaffirm a shared commitment to self-determination for Aboriginal peoples, their right to speak proudly and publicly about their culture and their heritage; and recognition that building a better understanding of Aboriginal cultural heritage in Australia is ongoing and together we can play an important role'.

BHP quotes First Nations Heritage Protection Alliance Co-Chair, Kado Muir, saying that

> 'We have been heartened by the constructive approach BHP have adopted to our discussions with them. Together we are determined to drive industry reform and legislative change that improves both agreement making and the protection of Aboriginal cultural heritage which is of immense value to all Australians'.

> [Sources: ACCR media release 13/10/2020; BHP media release 13/10/2020; 13/10/2020]

Related News: Separately, the ACCR welcomed BHP's suspension of its membership of the Queensland Resources Council (QRC), arguing that the move demonstrates the value of ACCR's recent shareholder proposal. The ACCR has also called on BHP consider suspending its membership of the Minerals Council of Australia and the Australian Petroleum Production and Exploration Association and for both Origin Energy and Santos to follow BHP's example in suspending their membership of the QRC

> [Source: ACCR media release 07/10/2020]

Meetings and Proxy Advisers

Federal Budget: The government's Digital Business Plan includes commitments to consult on making changes to the Corporations Act to permanently enable electronic meetings and electronic execution of documents

Key Takeouts

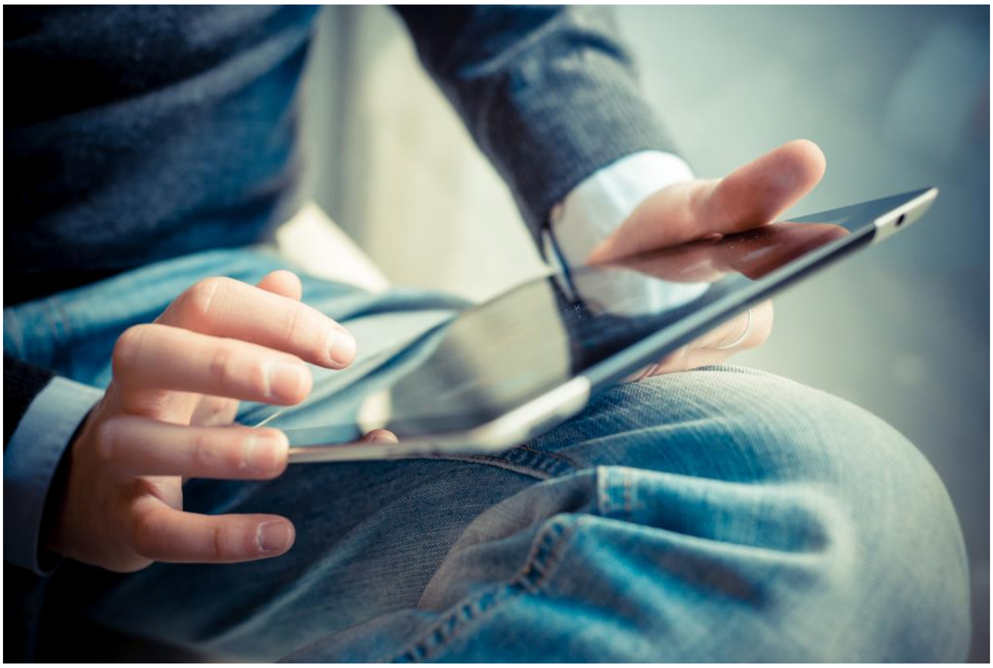
- The government's Digital Business Plan unveiled in the 2020 Federal Budget, includes (among other commitments): a) a commitment to consult on making temporary changes to the Corporations Act enabling electronic meetings and electronic execution of documents permanent; b) commits $419.9 million in funding over four years to implement the transfer existing business registers to a single consolidated and modernised platform; c) commits $256.6 million over two years to continue the development and expansion of 'Digital Identity'; and d) commits $28.6 million for the continued implementation of the Consumer Data Right and to enable work to commence on the rollout of the CDR to the energy sector.
- The Governance Institute and the Australian Institute of Company Directors have each issued separate statements welcoming the government's commitments.

As part of the Federal Budget, the government has released details of its $796.5 million 'digital business plan' which will be rolled out over the next four years. The plan is aimed at: a) making Australia a 'leading digital economy by 2030'; b) improving productivity; and c) fostering income and jobs growth by supporting the adoption of digital technologies by Australian businesses.

In a statement announcing the package ahead of the budget, Prime Minister Scott Morrison and said that it is estimated that the measures will increase Australia's GDP by $6.4 billion a year by 2024.

Key Measures

Measures include the following (among others).



- **Modernisation of Corporations Act meeting/electronic execution requirements:** Undertaking public consultation on making permanent changes to the Corporations Act 2001 (Cth) to enable companies to hold meetings electronically and to provide certainty that company officers can electronically execute a document.
- **Modernisation of business registers:** $419.9 million over four years to transfer existing business registers to a single consolidated and modernised platform.
- **Digital identity:** $256.6 million over two years to continue the development and expansion of Digital Identity to improve access to government services and payments online.

- **Consumer Data Right:** $28.6 million for the continued implementation of the Consumer Data Right and to enable work to commence on the rollout of the CDR to the energy sector
- **Supporting fintech startups:** $9.6 million investment over four years to enhance support for Australian fintech start-ups.
- **Measures to encourage small business to adopt digital technology:** $22.2 million to support small business operators to take advantage of digital technologies through an expansion of the Australian Small Business Advisory Service - Digital Solutions program, a Digital Readiness Assessment tool and a Digital Directors training package
- **E-invoicing:** $3.6m in funding over two years to facilitate the adoption of e-invoicing across all levels of government and to consult on options for mandatory adoption of e-invoicing by all levels of government and by business

[Sources: Budget Paper No 2 Budget Measures; Prime Minister Scott Morrison media release 29/09/2020]

Response

Responding to the Prime Minister's 29 September announcement, The Australian Institute of Company Directors (AICD) welcomed the government's commitment to consult on enabling meetings to be held electronically and to enable electronic execution of documents. AICD Managing Director and CEO, Angus Armour said

> 'We are very pleased to hear that the Government will consult on making these measures permanent. To accelerate Australia's economic recovery, it's vital that our laws reflect the modernisations embraced by organisations during the COVID-19 period. These include laws around virtual AGMs and electronic documents. The AICD is looking forward to being part of the discussion on permanent reform.'

Separately, the Governance Institute of Australia issued a statement also welcoming the measures stating that it is 'very pleased to see that the government is keen to continue the conversations on making these steps permanent by launching plans for consultations'.

The Governance Institute also welcomed measures to fund the consolidation and modernisation of business registers and the funding of the digital identify system.

Governance Institute CEO Megan Motto said,

> 'A key Governance Institute recommendation has been confirmed with funding now guaranteed for the full implementation of the Modernising Business Registers program. We have seen $419.9 million allocated to fully implement the Modernising Business Registers program — one of our core "wish list" items was for this program to receive adequate funding to continue, so this is to be welcomed…Governance Institute has also welcomed the $256.6 million to develop a Digital Identity system. This will facilitate the implementation of the Director ID by enabling the 2.7 million directors that will be required to apply for a Director ID to digitally verify their identity'.

[Sources: AICD media release 30/09/2020; Governance Institute of Australia media release 06/10/2020]

What is/isn't OK? The Governance Institute has released an expert opinion on the current legal requirements around virtual meetings and electronic execution and storage of documents

As a result of the issues that the COVID-19 pandemic has raised concerning the execution of documents and the holding of meetings, The Governance Institute sought and has now released a legal opinion from Douglas Gration, accompanied by a short summary, outlining the current legal requirements around eight key issues. Namely: 1) the electronic storage and execution of documents; 2) electronic execution requirements; 3) electronic execution of deeds; 4) electronic meetings; 5) notices of meeting; 6) minutes of electronic meetings; 7) the location of meetings held electronically and 8) COVID-19 relief.

The table below provides a brief snapshot of some of the key points. The full text of Counsel's opinion and the Governance Institute's statement is available here.

ISSUE	QUESTIONS	COUNSEL'S OPINION
Electronic storage of books/financial records	▪ Is a company permitted to store books and financial records electronically which are required to be kept under the Corporations Act 2001 (Cth) (the Act)? ▪ Is a company permitted to maintain registers which are required to be kept under the Act electronically? ▪ Are there evidentiary issues with proof of the contents of books and financial records and registers which are required to be kept under the Act and which are kept electronically?	▪ Books and records required to be kept under the Act as well as a company's registers are able to be stored electronically. ▪ On the question of whether electronic storage raises any evidentiary issues, counsel states that 'Written reproductions of books which are required to be kept under the Act, and which are kept on a computer, are admissible in evidence and are prima facie evidence of their contents'.
Electronic execution requirements	▪ Can documents which are required to be signed under the Act be signed electronically? ▪ If the signed document is required to be kept, does this mean that the document must be signed with a 'wet signature'?	▪ On the first question, Counsel states that 'In summary, documents required to be signed under the Act can be signed electronically if the signatory has authorised the affixation of their electronic signature'. Counsel suggests that as a matter of practice it will be necessary to prove that the signatory authorised or authenticated the affixation of their signature in this way eg through an email from the signatory or a separate written document, a file note of a phone conversation in which the signatory authorised use of their signature in this way. Mr Gration also suggests that it might be 'appropriate to record the approval and authorisation for the use of electronic signatures in board minutes relating to the relevant transaction'. ▪ On the second question, there is no need for documents that are required to be kept to be signed with a 'wet signature' – they may be signed electronically. If the document is signed electronically, proof should also be kept that the signatory authorised/authenticated the affixation of their electronic signature.
Electronic execution of deeds	▪ Are deeds executed by companies required to be signed with a 'wet signature'?	The approach is different in different jurisdictions: ▪ NSW: Counsel states that 'The common law position has been altered in New South Wales by section 38A of the Conveyancing Act 1919 (NSW) which provides that a deed may be created in electronic form and electronically signed'. ▪ QLD/VIC: Both Queensland and Victoria have enacted temporary relief in response to the COVID-19 pandemic which enables deeds to be created and executed electronically. ▪ Other jurisdictions: Other jurisdictions do not specify specific requirements for deeds. Counsel's opinion is that 'It is therefore likely that in jurisdictions other than

ISSUE	QUESTIONS	COUNSEL'S OPINION
		New South Wales, and temporarily Queensland and Victoria, deeds cannot be created or signed electronically. A paper document, executed with a "wet signature", is the safest approach'.
Electronic meetings	▪ Are companies permitted under the Act to hold meetings of directors and shareholders electronically?	▪ Counsel's opinion is that the Act allows meetings of both directors and members of a company to be held electronically. ▪ Director meetings: Where directors have adopted a practice of meeting electronically, it may be appropriate for directors to consider recording formally the technologies by which they have agreed their meetings can be held. ▪ Member meetings: Though ASIC and others have expressed doubt about the validity of virtual meetings, recent cases have held that virtual meetings can satisfy the requirements of section 249S so long as members have a reasonable opportunity to participate.
Notices of meeting	▪ What are the requirements in respect of the notice of meeting and minutes of a meeting to be held electronically?	▪ Notice of a directors' meetings can be given in writing or by telephone or email. ▪ There are no statutory requirements as to the content of a notice of meeting of directors. Counsel comments that 'at common law, and as a matter of common sense, the notice must specify the time and place of the meeting. If the meeting is to be held using technology, the notice of meeting should specify how to access the meeting through that technology'.
Minutes of electronic meetings	▪ Can the minutes of a meeting be signed electronically for the purposes of s251A of the Act? ▪ If minutes can be signed electronically how should they be signed to ensure validity? ▪ Where a meeting is held electronically, should the location be included in the minutes?	▪ Minutes of a meeting can be signed electronically in the same way as other documents required to be signed under the Act (as described already above). Counsel suggests that it may be 'appropriate to ask the directors to pass a resolution noting and agreeing that the minutes will be (or have been) signed electronically'. ▪ On the question of recording the location of the meeting in the minutes, Counsel suggests that 'as a matter of good practice, the minutes of a meeting held in a small number of places would ordinarily record the places at which the meeting was held'. If the meeting is held entirely electronically, the minutes should record the technology by which the meeting was held but would not record where each individual participant in the meeting was located. However, 'if the location of the central management and control of a company is important, the minutes should record where the individual participants in a meeting held by telephone or videoconference are physically located'.

[Source: Governance Institute Statement on electronic storage and execution of documents and electronic meetings October 2020]

Mixed report card: The FRC's review of a sample of AGMs held over the first half of 2020 concludes that though the 'best organised' electronic meetings enabled increased shareholder participation, retail shareholders at other companies were left disenfranchised

Key Takeouts

- The FRC's review of a sample of AGMs held in the first half of 2020 turned up mixed results. Though the 'best organised and executed virtual and hybrid meetings enabled increased participation from shareholders' others left retail shareholders unable to participate (eg by asking questions of the board prior to/during the AGM) or vote on the day of the AGM prompting concerns that any more permanent shift to electronic meetings may serve to disenfranchise shareholders.
- The report calls on companies, going forward, to increase their use of technology to facilitate 'robust virtual interaction' during AGMs and ensure shareholders have opportunity to effectively hold boards to account.
- Annex 1 of the report sets out best practice for holding electronic AGMs that the FRC encourages companies to consider when planning/conducting future meetings.
- The FRC will also continue to work with the government on what measures may need to be fast tracked to ensure that AGMs can take place electronically during 2021 and will convene a stakeholder group to consider how additional clarity can be provided on the legal requirements to introduce more flexibility for companies.

The UK Financial Reporting Council (FRC) has conducted a review of a sample of 2020 FTSE 350 AGMs held during the first half of 2020. The review considered the different approaches companies took to holding AGMs during the period in light of the need to rapidly switch to holding meetings in electronic format, and the extent to which these approaches served/did not serve the interests of shareholders.

Ultimately, the review concluded that though the 'best organised and executed virtual and hybrid meetings enabled increased participation from shareholders' others left retail shareholders unable to participate (eg by asking questions of the board prior to/during the AGM) or vote on the day of the AGM. prompting concerns that any more permanent shift to electronic meetings may serve to disenfranchise shareholders.

The report calls on companies to increase their use of technology to facilitate 'robust virtual interaction' during AGMs and ensure shareholders have opportunity to hold boards to account. Annex 1 to the report includes best practice guidance that companies should consider when planning and conducting future AGMs.

Some interesting findings

Minimal opportunity for shareholder participation at most companies:

- Most companies (80.7% of FTSE 350 companies) elected to hold 'closed meetings' where shareholders were required to vote in advance via proxy.
- Of the 163 companies that held closed meetings, 81.6% made arrangements to allow for shareholders to ask questions of the board mainly facilitated through questions emailed to the board in advance of the AGM.
- 30 companies (18.4%) made no arrangements for shareholders to ask questions of the board either prior to or during the meeting.

Examples of poor practice

The report includes a number of examples of 'poor practice'. These include: a) instances where questions submitted were subject to a cap on the number of characters allowed; b) requiring questions to be 'mailed in' rather than accepted questions submitted via email ahead of the meeting; c) 'unrealistic time frames' being set to submit questions; c) questions grouped under one heading and answered with one 'generic answer' with no clarification/additional input from shareholders; and d) companies electing not to respond to all questions.

Some companies elected to hold 'open meetings' with opportunity for shareholder participation

Of the 30 companies that held open meetings, 60% were facilitated through webinars or audiocast with live voting capabilities.

Better practice examples included: a) accepting questions from shareholders either by mail or questions submitted to a dedicated website/email address; b) allowing sufficient time for shareholders to submit questions/not asking for questions to be submitted too far in advance; c) making clear on what basis shareholder questions would be grouped; d) contacting shareholders who submitted similar questions to let them know that their questions would be grouped but still including written responses to individual questions on the website; e) publishing all questions and answers on the company website following the AGM.

Next steps

The report expresses the hope that going forward, companies will ensure retail shareholders have opportunity to engage/participate during AGMS, including through having the opportunity to ask questions on the day of the AGM and that this is likely to require a 'significant increase in the use of technology' to facilitate 'robust virtual interaction during the AGM'.

The report acknowledges that some of the issues raised in the report may require government action to 'offer additional flexibilities or clarity' on the operation of existing legal requirements, but observes that there is clearly 'a desire for change and an enthusiasm to engage on the issue' among stakeholders.

On this basis, the FRC proposes to convene a Stakeholder Group (including representatives from government, companies, investors and their representatives) to consider the need for legislative change and to 'propose alternative means to achieve some of the flexibilities whilst maintaining the integrity and objective of the AGM'.

[Sources: FRC media release 06/10/2020; FRC report: Corporate Governance AGMs: An opportunity to change 2020]

Recent AGM results: AGL, Brambles, Telstra and CBA

AGL Energy Ltd AGM results

The AGL AGM was held virtually on 7 October. All board supported resolutions were carried.

Remuneration report

The resolution to approve the remuneration report was carried with 53.5% support (46.5% votes against). As more than 25% of votes were cast against the resolution, this constitutes a first strike.

The resolution to approve termination payments for eligible senior executives was carried with 98.17% support. The resolution granting performance rights under the long term incentive plan to AGL CEO and Managing Director Brett Redman was also carried to with 69.61% support (30.39% of votes against).

In his address to shareholders, AGL Chair Graeme Hunt acknowledged shareholder concerns about the remuneration report and payment of incentives and committed to further engagement on the issue.

In a voting bulletin issued after the meeting, BlackRock said that it voted in support of the resolution to approve the remuneration report and in support of the resolution to grant performance rights to Mr Redman.

BlackRock says that it supported the resolution to approve the remuneration report because: a) it considers that AGL's financial performance for FY 20 was 'reasonably strong'; b) AGL maintained a dividend payment and demonstrated disciplined balance sheet management; c) AGL 'performed strongly' against the strategic measures component of the performance scorecard; and d) AGL achieved this without the benefit of government subsidies.

In addition, BlackRock welcomed the work undertaken by the company at the beginning of FY 20 to restructure the remuneration policy to 'shift reward outcomes away from short-term cash incentives toward longer-term share awards in order to better align with shareholder interests'.

The California Public Employees' Retirement System (CalPERS) voted against the remuneration report.

Election/re-election of directors

Peter Botton who was standing for re-election was re-elected with 79.07% support (20.93% votes against). Mark Bloom was elected with 99.59% support.

CalPERS voted against Mr Botton's reelection.

ESG (climate) resolutions

Neither of the two shareholder resolutions were supported by the AGL board, and neither were carried.

The special resolution seeking to amend the constitution received 5.62% support (94.38% of votes against). The contingent ordinary climate related resolution — to bring forward closure dates for coal fired power plants - was not put to the meeting. The resolution received 19.96% proxy support (including support from BlackRock).

Commenting on the coal closure resolution in his address to the meeting, AGL Chair Graeme Hunt said that AGL remains committed to closing the power plants by 2035 and 2048 as previously announced and does not consider that committing to earlier closure dates at this time is in either the best interests of stakeholders or shareholders. Mr Hunt said,

> 'AGL does not consider that it is in the best interest of shareholders or other stakeholders for AGL to make firm commitments at this time to phase out coal power generation earlier than the existing planned closure dates. Rather, it is in the best interests of shareholders for AGL to focus on delivering its commitments made in the climate statement and to continue to work constructively with industry regulators and government on delivering orderly transition to a decarbonised energy system. AGL will continue to evolve the scenario analysis it undertakes each year in relation to carbon risk and to engage with relevant stakeholders and keep shareholders fully informed.'

Support for the resolution

CalPERS: CalPERS voted in support of both the constitutional amendment and the resolution to bring forward the closure of coal power stations.

BlackRock: In a voting bulletin, published shortly after the meeting BlackRock outlined its reasoning for voting against the special resolution to amend the constitution, and for the resolution to bring forward the closure of coal fired power plants.

BlackRock states that it voted against the resolution to amend the company's constitution on the basis that:

> 'BlackRock is generally not supportive of constitutional amendment resolutions as the relative ease of filing risks potentially distracting and time-consuming proposals being submitted by shareholders whose interests are not necessarily aligned with those of the broader shareholder base'.

BlackRock explains that it supported the ordinary resolution as a means of encouraging AGL 'to continue to develop its strategy to transition its business model to operating under a 1.5-degrees scenario and position itself to respond to the continued evolution of the energy sector and policy environment in Australia longer term' which BlackRock believes to be in the best long term interests of both shareholders and the company.

BlackRock states,

> …'we believe the company, and its shareholders, would benefit from a continued focus on long-term strategic planning covering several decades. AGL's 1.5-degree scenario analysis, aligned with the recommendations of the Taskforce on Climate-related Financial Disclosure (TCFD), implies it is possible to close the coal-fired Loy Yang plant twelve years ahead of the current scheduled closure. The proposal, and our support of it, affords the AGL board and executives the discretion to manage that timing to ensure an effective and safe closure at the appropriate time.

In a statement, the Australasian Centre for Corporate Responsibility (ACCR) welcomed BlackRock's support of the coal closure resolution and expressed disappointment that proxy advisers and members of Climate Action 100+ did not throw their support behind it. Commenting on the response to the resolution, ACCR Director of Climate and Environment Dan Gocher said

> 'Blackrock's support for this resolution embarrasses Australian super funds and asset managers who voted against the resolution. It demonstrates an increasing trend that European and US investors are more prepared to take critical action to address climate risk…Do signatories to the Climate Action 100+ initiative stand for climate action in line with the Paris Agreement, or do they only act when it is "commercial" to do so? It's not commercial for AGL to keep running coal plants beyond the 2030s that cost more than they earn. Far too many Australian investors live in fear of blowback from a government committed to stalling progress on climate action. Increasingly, European and US investors see through the bluster and vote for what is in the best long-term interests of shareholders'.

Separately, Market Forces similarly expressed disappointment that the resolutions did not attract higher levels of support. Market Forces also raised concerns that AGL's decision not to lock in earlier closure dates signals that the company 'will continue its recent trend of pouring hundreds of millions of dollars into propping up its dirty coal fleet, instead of rapidly replacing its capacity with renewable energy and storage solutions'.

[Sources: AGL ASX Announcements: 2020 AGM Addresses 07/10/2020; Results of meeting; ACCR media release 07/10/2020; Market Forces media release 07/10/2020; BlackRock Voting Bulletin; CalPERS voting decisions]

Brambles Ltd AGM results

Brambles AGM was held as a virtual AGM on 8 October. All resolutions were carried.

Remuneration report

The resolution to approve the remuneration report was carried with 98.72% support

Rationale for making no adjustments to executive remuneration: In his address to shareholders, Brambles Chair John Mullen provided an overview of the rationale underpinning the design and structure of executive remuneration at the company and the rationale for making no adjustments to executive remuneration in light of COVID-19.

No adjustments warranted as a result of COVID-19: Mr Mullen said that in determining whether adjustments were necessary the Committee had regard to a the following three factors: 1) the fact that Brambles has not had to make substantial redundancies because of the pandemic; 2) 'the outstanding job all our employees did in keeping our businesses operating during the pandemic; and 3) 'the fact that the impact of COVID-19 on the automotive and Kegstar businesses adversely impacted group earnings which would otherwise have been higher'. On balance Mr Mullen said that the Committee considered that 'the right balance between motivating our employees, shareholder interests and broader community expectations, was to maintain the 2020 incentive plans in place and without adjustment up or down to the original performance conditions to which they were subject'.

Mr Mullen went on to say that the Committee also considered whether adjustments to executive incentives were warranted as a result 'any behavioural events or incidents which occurred during the year'. Mr Mullen said that he is 'pleased to report that no such incidents or events' were identified.

CalPERs supported all resolutions including the remuneration report.

[Sources: Brambles ASX Announcements: Brambles 2020 AGM - Chairman's and CEO's Addresses; Results of Meeting; CalPERS voting decisions]

Telstra Corporation Ltd AGM results

Telstra's AGM was held as a virtual meeting on 13 October. All resolutions had board support and all were carried, including the resolution to adopt a new constitution allowing greater flexibility for the company to hold meetings electronically 'particularly if the Corporations Act is amended to be more facilitative of such meetings in the future'.

Remuneration report

The resolution to approve the remuneration report was carried with 97.79% support. The two resolutions granting equity to the CEO were also passed with 98.76% and 99.27% support.

No adjustments necessary as a result of COVID-19: In his address to the meeting, Telstra Chair John Mullen explained the board's reasoning in not adjusting executive remuneration in light of the impact of COVID-19. Mr Mullen said,

> 'Unless there is good reason, the board prefers to let the [remuneration] scheme run without adjustment, making sure that shareholders can see exactly what management are being rewarded to deliver'.

In line with this approach, Mr Mullen said that the board gave 'detailed consideration' to the impact of COVID-19 on the company's performance and determined that on balance, no adjustment was necessary because the scheme already operated to take into account the impacts of the pandemic. In certain instances, performance targets were not met (eg EBITDA and NPS thresholds) and executives were not rewarded. In areas where the pandemic had a positive impact (eg digital engagement), executives were rewarded accordingly. Overall, he said that the net result for executives in terms of outcomes was negative.

Reduction in pay outcomes for three executives: Mr Mullen flagged that the board decided to exercise its discretion to reduce by10% pay outcomes for three executives, including the CEO, as a result of an historical issue relating to sales practices in a small number of partner stores. The board considered that though the executives bore no personal responsibility for these historical issues, they were, as leaders, ultimately accountable.

Time to rethink remuneration? On a separate note, Mr Mullen also commented that a broader rethink of executive remuneration may be warranted. Mr Mullen said,

> 'I do wonder if it is time to consider a simpler model going forward. I am old enough to remember when I just got paid a salary and if I did a bad job I was fired. I sometimes wonder whether we should not go back to those days and just give senior executives a fixed salary, the majority of which would be paid in shares so that if the company's shares perform well then the executive would earn more and if they perform badly the executive would earn less.
>
> This is a discussion for another day but it would greatly simplify the whole executive remuneration debate, eliminate the need for most of the ever more complex remuneration reports everyone produces, save countless hours of debate at Remuneration Committees and eliminate hundreds of thousands of dollars spent on remuneration consultants and the entire industry that has grown up around the issue.'

Election/re-election of directors

Peter Heart was re-elected to the board with 99.5% support. Chair John Mullen was re-elected to the board with 96.05% support. New directors Bridget Loudon and Elana Rubin were each elected with 97.38% support and 99.78% support respectively.

Adoption of new constitution

The resolution to adopt a new constitution was carried with 99.84% support. The full text of the amended constitution is here.

Greater flexibility to enable meetings to be held by electronic means: Among other changes, the amendments adopted at the meeting 'provide greater flexibility for Telstra to conduct "hybrid" and "virtual" meetings using technology in the future, particularly if the Corporations Act is amended to be more facilitative of such meetings in the future'.

In particular, the changes allow Directors to approve the technology to be used at a general meeting subject to the technology enabling shareholders 'reasonable opportunity' to participate in the meeting.

Consequential provisions were also made to confirm 'online' attendees are treated as being present at the meeting and are counted for quorum.

Telstra's Notice of Meeting makes clear that the company has 'no current intention to move permanently or wholly to "virtual" online meetings' but that the board considers the option of holding meetings electronically to be in shareholders' interests. The Notice of meeting states that the

> …'board considers the proposed amendments are in the best interests of shareholders as they provide Telstra with future flexibility to hold "virtual" meetings if the Board was of the view that circumstances exist where this would be beneficial and in the interests of shareholders. The amended provisions also allow greater flexibility to hold "hybrid" meetings in the future, which would provide additional opportunities for shareholders to participate in meetings in the manner most convenient to them'.

CalPERS voted in support of all resolutions including the adoption of a new constitution.

[Sources: Telstra ASX Announcements: AGM Meeting Results; 2020 AGM Chair's address; CalPERS voting decisions; Telstra Notice of Meeting]

Commonwealth Bank of Australia AGM Results

CBA's AGM was held virtually on 13 October. All board supported resolutions were carried.

Remuneration Report

The resolution to approve the remuneration report was carried with 79.17% support (20.83% against). A resolution granting securities to CBA CEO Matt Comyn was also carried with 79.02% support (20.96% against).

The AFR reports that Ownership Matters, CGI Glass Lewis, The Australian Council of Superannuation Investors, Australian Super and the Australian Shareholders Association all voted in support of the resolutions. CalPERS also voted in support of both resolutions.

The Australian and the AFR separately report that ISS advised against supporting both resolutions.

Election/re-election of directors

Rob Whitfield (Chair of the Risk and Compliance Committee) was re-elected to the board with 98.94% support. CalPERS voted against the reelection of Rob Whitfield to the board.

Simon Moutter was elected to the board with 99.84% support. In her address to the AGM, CBA Chair Catherine Livingstone said that as the former Managing Director of New Zealand's largest telecommunications and digital services company, Spark NZ, and with a background in science and engineering Mr Moutter will bring a deep understanding of technology, process efficiencies and business strategy to the board.

Shareholder resolution to amend the constitution

The special shareholder resolution calling on CBA to amend the constitution to restrain CBA from entering into certain 'high risk investments' without first securing shareholder approval (by ordinary resolution) was not supported by the board, and was not carried securing only 0.74% support. The full text of the resolution is reproduced in the Notice of Meeting at p9.

CalPERS voted against the proposal.

[Source: CBA ASX Announcements: Results of AGM; Chair's address; Notice of Meeting; CalPERS voting decisions]

Newcrest shareholders asked to approve updated constitution: proposed updates include amendments to enable the company to hold meetings electronically and to facilitate direct voting

Newcrest is set to hold its virtual AGM on 11 November.

Newcrest Mining Ltd shareholders will be asked to approve updates to the company's constitution at the virtual AGM to be held on 11 November. Among other things, the proposed changes include amendments to provide the company with 'greater flexibility when conducting general meetings' by:

- allowing general meetings to be held 'at multiple places, using technology that gives shareholders a reasonable opportunity to participate'
- facilitating direct voting

- clarifying that if the Chair 'hands the chair of the meeting to an Acting Chairman for a relevant part of the meeting, proxies provided to the chair of the meeting will be taken to be in favour of the Acting Chairman for that part of the meeting'.

Newcrest has made available on its website a copy of the proposed updated constitution with changes marked. This can be accessed here.

[Sources: Newcrest Mining Ltd ASX Announcement Notice of Meeting 05/10/2020; 2020 Proposed Amended Constitution]

Institutional Investors and Stewardship

Climate League 2030, an initiative backed by 16 institutional investors, commits to supporting action/taking action to reduce emissions

The Investor Group on Climate Change (IGCC) has coordinated a new private sector focused ten year initiative - Climate League 2030 – aimed, in line with Australia's global commitments under the Paris Agreement, at driving down the nation's annual greenhouse gas emissions by at least a further 230 million tonnes from what is projected for 2030.

Participants

The initial participants are 16 institutional investors with over $850 billion collective assets under management. A full list of current participants is here. Over coming months Climate League 2030 will be progressively opened to insurers, banks and other companies.

Actions/commitments

- Participants in the initiative commit to support efforts and take action to reduce emissions and pledge at least one new action each year under three themes: 1) integrating Paris-aligned emissions reduction goals into their investment policies or business strategies; 2) collaborating with investors, clients and companies to deliver emission reductions; and 3) investing in new clean energy, clean technology and other projects and measures that reduce Australian emissions.
- Actions already registered under the initiative include: portfolio-wide emissions reduction goals of up to 45% by 2030 and net zero by 2050, engagement programs seeking climate action from companies, and investment targets for renewable energy and other clean technology.
- Participants are required to report annually on their progress and explain how their registered actions have/will lead to progress against the emission reduction target.
- The initiative intends to publish a first progress report in late-2021.

The private sector can play a crucial role

IGCC acknowledges that participants 'may not be able to deliver whole-of economy Paris-aligned emissions reductions alone' but maintains that 'the size and influence of investors, businesses and financiers means they are critical to making a demonstratable shift in our current emissions trajectory'.

Announcing the initiative, IGCC Chair, Stephen Dunne commented,

> 'Climate League 2030 is a clear demonstration of the important role the private sector can and will play in meeting our national climate change challenge. Institutional investors hold an important stewardship role in our economy that puts us in a unique position to help facilitate an orderly transition to net zero emissions that is aligned with the goals of the Paris Agreement. Listed companies are responsible for 40% of Australian emissions, while infrastructure has been connected to 70% of domestic greenhouse gas pollution. Through our universal ownership and management of equities, fixed and other assets, investors can help ensure real-world emissions reductions through our portfolio decisions, management and company engagement.'

Former Governor of the Bank of England and current United Nations Special Envoy on Climate Action and Finance, Mark Carney said that the initiative is 'welcome progress'.

> 'Investors are increasingly recognising that climate risk is investment risk. That is why, for COP26, we want every financial decision to take climate change into account. The IGCC's work to make this a reality through their Climate League 2030 initiative is welcome progress. With assets of $3.5 trillion, the Australian pension industry is the fifth largest in the world. This gives it significant influence on companies and signals support for Paris-aligned, economy-wide emissions reductions.
>
> [Sources: IGCC media release 14/10/2020; Climate League 2030]

Markets and Exchanges

ASIC and the RBA outline their expectations for the replacement of the outdated CHESS system

The Australian Securities and Investments Commission (ASIC) and the Reserve Bank of Australia (RBA) have released a statement outlining their expectations of the ASX with respect to the replacement of the 25+ year old Clearing House Electronic Sub-register System (CHESS). ASIC and the RBA expect ASX to:

- replace CHESS as soon as this can be 'safely achieved' taking into account CHESS user feedback on a revised implementation timeline
- demonstrate the readiness of the CHESS replacement system and provide supporting independent assurances to the regulators (ASIC and the RBA) that the replacement system meets certain requirements before migrating to the new system.
- New system requirements: ASIC states that at a minimum, the new system is expected to meet the same availability, resilience, recoverability, security and performance requirements as CHESS as well as meeting additional new 'non-functional business requirements'. ASX is also expected to achieve a significant uplift in intraday trade processing capacity and end-of-day processing performance in the new system.

ASIC states that the broader Council of Financial Regulators (CFR), the RBA and the Australian Competition and Consumer Commission are also closely supervising ASX's conduct in the CHESS replacement program of change in accordance with the CFR's Regulatory Expectations for Conduct in Operating Cash Equities Clearing and Settlement with a view to ensuring that the ASX remains responsive to users' evolving needs.

ASIC and the RBA will continue to closely supervise ASX's CHESS replacement program of change.

[Source: ASIC media release 01/10/2020]

Regulators

APRA to roll-out a new supervision risk and intensity model

Key Takeouts

- APRA has commenced the process of replacing its nearly 20 year old existing PAIRS and SOARS risk assessment framework with a 'more contemporary model able to better respond to the changing landscape', the Supervision Risk and Intensity Model (SRI model).
- APRA says that the SRI model will: a) place increased emphasis on non-financial risk 'whilst preserving the importance of financial resilience'; b) introduce recovery and resolution considerations and c) more effectively take into account the impact of the external environment on entities' risk profiles.
- The transition from PAIRS and SOARS to the new model commenced this month and is due to be completed by June 2021.
- The transition to the new model could lead to a change in the intensity of supervision that APRA applies to some entities.

Transition to a new and more effective risk model

In a letter to regulated entities, the Australian Prudential Regulation Authority (APRA) has advised that it will shortly commence the process of replacing the existing Probability and Impact Rating System (PAIRS) and the Supervisory Oversight and Response System (SOARS) framework which has been in place since 2002 with an updated risk model, the Supervision Risk and Intensity Model (SRI model).

The new SRI model will be used to assess the level of prudential risk within APRA's regulated entities across various risk categories and this information will be used to inform the intensity of APRA's supervisory response.

APRA states that the SRI model differs from (and is superior to the existing PAIRS and SOARS framework) because it will:

> '…ensure greater elevation of non-financial risks whilst preserving the importance of financial resilience. It also introduces recovery and resolution considerations, and more systematically factors in the impact of the external environment on an entity's risk profile. The new model better caters for industry nuances, and is aligned with APRA's enforcement approach to ensure a timely and appropriate supervisory response to identified risks'.

APRA Chair Wayne Byres said,

> 'The new SRI Model is more contemporary and sophisticated than its predecessor. The model includes a degree of tailoring to each individual sector, and its greater flexibility will help APRA respond to changes in the risk environment, such as those posed by the current pandemic'.

The SRI model: Three core elements

The new model is made up of three core elements: tiering, risk assessment and staging.

1. Tiering reflects the potential impact that 'entity failure, imprudent behaviour or operational disruptions could have on financial stability, economic activity and the Australian community'. Which of the four tiers entities fall into will impact the level of supervisory attention APRA will apply.
2. Risk Assessment: APRA will assess the level of prudential risk within APRA's regulated entities across various risk categories. The depth of risk assessment will be informed by the tier assigned to the entity ensuring that entities of higher systemic importance will be subject to more detailed risk assessment than those of less importance.
3. Staging: Staging – APRA will assign an overall 'supervisory stage' (from Stage 1: 'Routine Supervision' escalating to Stage 5: 'Resolution') for each entity based on the outcomes of the risk assessment. This staging will inform APRA's supervisory/enforcement approach in relation to that entity.

Timing: The transition process is set to be completed by June 2021.

What this means for regulated entities

APRA advises that the shift to the new model and the attendant shift in approach could mean that some entities face 'a change in the intensity of supervision' which may differ from the current APRA supervisory stance under the PAIRS and SOARS framework.

However, until APRA undertakes its SRI risk assessment, entity's current PAIRS and SOARS settings will remain in place. Entities will be advised of their tier and stage once their first SRI assessment is completed. As is currently the case, an entity's tier and stage will remain confidential.

APRA encourages entities to familiarise themselves with the way the new model works on this basis.

Further detail about the new model

The letter directs entities to the SRI model guide on the APRA website (here) which outlines the new risk categories, the risk rating approach and how this will impact the intensity of APRA's supervisory response and to the FAQs on the new model (here). APRA plans to conduct a series of webinars in November 2020 to provide an overview of the new SRI model and answer any questions.

[Sources: APRA media release 06/10/2020; Letter to industry; SRI FAQs; SRI Model Guide]

Supervision of the insurance sector: APRA has advised that it has elected to commence work to align its prudential standards/practices with the ComFrame framework

The Australian Prudential Regulation Authority (APRA) has said that 'where appropriate', it will work towards aligning its prudential standards and practices with the International Association of Insurance Supervisors' (IAIS) Common Framework for Supervision of Internationally Active Insurance Groups (ComFrame).

The process of alignment will be gradual: In a letter to QBE Insurance Group Limited (QBE), APRA advised that the process of alignment will be iterative, with standards being aligned to ComFrame as part of more substantial updates that occur over time to APRA's prudential framework. APRA will consult with industry when making changes to prudential standards in line with the usual development process.

QBE designated as an internationally active insurance group (IAIG): The letter also advises that having undertaken an assessment of its regulated insurers, APRA has determined that QBE Insurance Group Limited (QBE) meets the IAIS' criteria as an IAIG which APRA considers will 'enhance APRA's group wide supervision of QBE'. APRA states that

> 'QBE writes insurance business across 25 jurisdictions. For most of these jurisdictions in which QBE operates, the supervisor is a member of the IAIS. Classification of QBE as an IAIG is therefore expected to promote the coordination of supervisory activities efficiently and effectively between the group-wide supervisor (APRA) and other international supervisors.'

[Source: APRA letter: Alignment of APRA's standards with ComFrame and classification of QBE as an IAIG 12/10/2020]

In Brief | APRA has released its annual report for FY 19/20. In his foreword to the report, APRA Chair Wayne Byres writes that APRA remains committed to meeting the government and the community's expanded expectations, despite the disruption caused by the pandemic, in line with the strategic objectives outlined in the regulator's corporate plan

[Source: APRA Annual Report 13/10/2020]

In Brief | The AICD has released a recording of an interview with ASIC Chair James Shipton in which he discusses the regulator's priorities for the year ahead including the regulator's approach to insolvent trading enforcement and culture

[Source: AICD recording: Essential Director Update 2020: ASIC Chair James Shipton in conversation 06/10/2020]

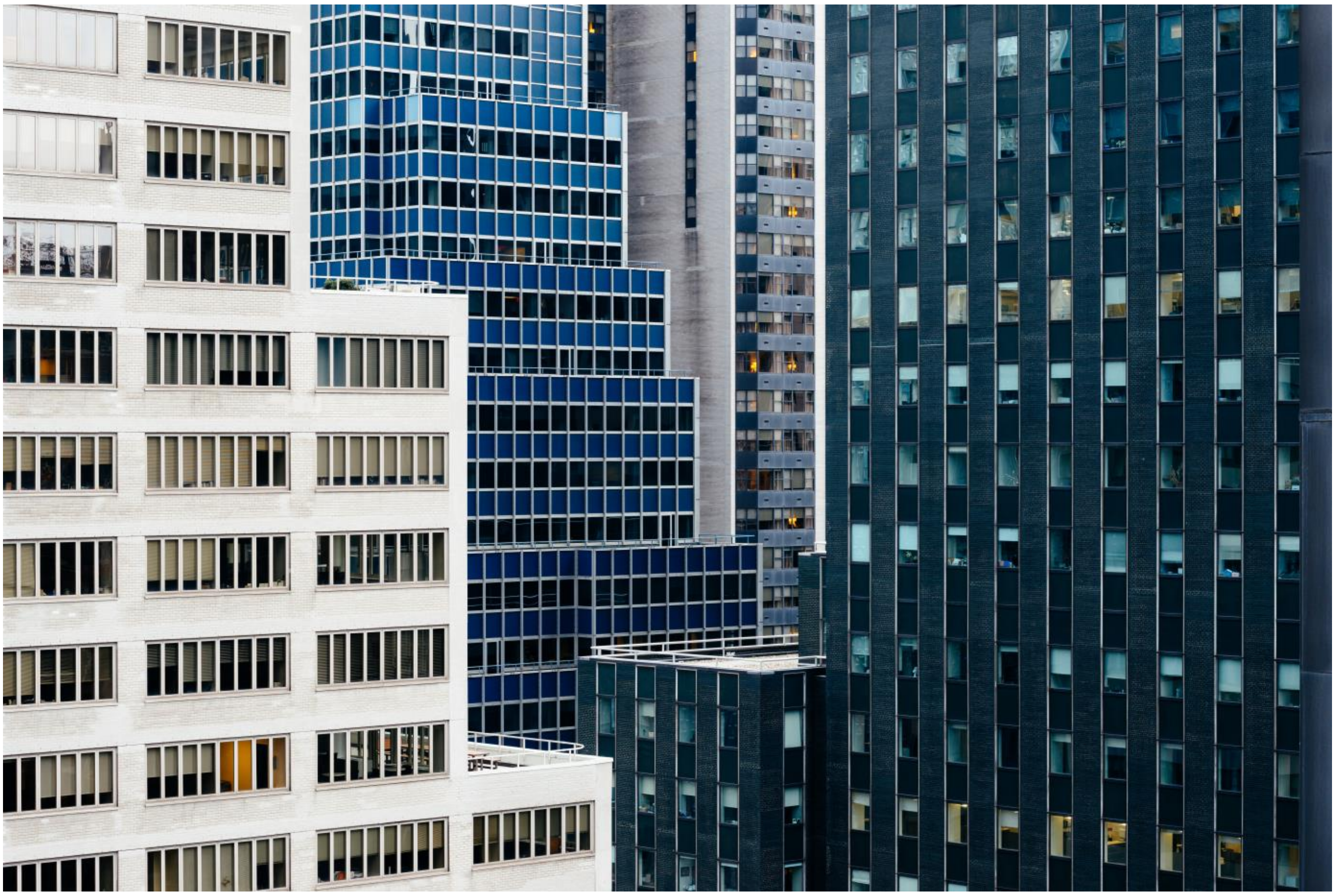
Financial Services

Top Story | MinterEllison report: A New Financial Services Landscape

MinterEllison has released a report reflecting on key challenges facing the financial services sector – including the implementation of Hayne recommendations, the immediate response to COVID-19 and preparing for the long-term downturn – and how this is shaping current activity as well as providing insights into emerging trends and reflecting on future challenges.

The report also outlines a number of steps that the banking, wealth management and insurance sectors can take now to best position themselves to meet upcoming challenges and opportunities.

The full text of the report is available here



Top Story | Responsible lending: The government has announced plans to overhaul responsible lending obligations

Key Takeouts

- In the interests of improving the flow of credit and supporting the nation's economic recovery, the government has announced plans to 'simplify' responsible lending obligations. Ahead of a formal consultation on the proposed changes, the government has released a fact sheet providing some detail around the proposed changes, including indicative timelines.
- Broadly, the government proposes to:
  - Remove responsible lending obligations from the National Consumer Credit Protection Act 2009 (Cth) except in relation to 'higher risk products' ie small amount credit contracts (SACCs) and consumer leases from March 2021. ADIs will be still be required to comply with the Australian Prudential Regulation Authority's (APRA's) lending standards, 'key elements' of which will also be extended to non-ADIs

- Strengthen consumer protections around provision of small amount credit contracts and consumer leases from six months after the legislation is passed
  - Require debt management firms representing consumers in internal and external dispute resolution processes to hold an Australian Credit Licence (ACL) from April 2021. This last change (if implemented) will mean that consumers involved in a dispute with a debt management firm representative will have access to the Australian Financial Complaints Authority (AFCA) to resolve the dispute

- The proposed changes appear to have been broadly welcomed by industry, but consumer groups have raised concerns.

- The government's announcement follows the decision in Australian Securities and Investments Commission v Westpac Banking Corporation [2020] FCAFC 111 (the appeal against the Wagyu and Shiraz decision, case note is here) in which their Honours Justice Gleeson and Justice Lee held that there is no statutory basis for ASIC's 'prescriptive' interpretation of responsible lending obligations.

In the interests of improving the flow of credit and supporting the nation's economic recovery, the Federal government has announced plans to overhaul consumer credit laws, including plans to roll back responsible lending obligations.

Announcing the government's planned changes, Treasurer Josh Frydenberg and Assistant Treasurer and Minister for Housing Michael Sukkar said:

> 'Now more than ever, it is critical that unnecessary barriers to accessing credit are removed so that consumers can continue to spend and businesses can invest and create jobs. What started a decade ago as a principles based framework to regulate the provision of consumer credit has now evolved into a regime that is overly prescriptive, complex and unnecessarily onerous on consumers. The Government will simplify the system by moving away from a "one-size-fits-all" approach while at the same time strengthening consumer protections for those that need it'.

Ahead of a formal consultation on the proposed changes, the government released a fact sheet providing some detail around what is being proposed, including indicative timelines.

What's being proposed?

The fact sheet states that the proposed changes have four key aims: 1) to simplify existing legal requirements thereby reducing the time and costs of credit assessments for consumers and businesses; 2) to reduce 'red tape' for consumers when applying for credit; 3) to improve competition by making it easier for consumers to switch lenders; and d) to enhance access to credit for small businesses.

Proposed simplification of responsible lending obligations (RLOs)

- The government proposes to remove responsible lending obligations from the National Consumer Credit Protection Act 2009 (Cth) except in relation to 'higher risk products' ie small amount credit contracts (SACCs) and consumer leases.

- Authorised Deposit Taking Institutions (ADIs) will still be required to comply with the Australian Prudential Regulation Authority's (APRA's) lending standards, but will no longer be required to also comply with the Australian Securities and Investments Commission (ASIC) guidance eliminating duplication/regulatory complexity.

- At the same time, 'key elements of APRA's ADI lending standards' will be extended to non-ADIs, with ASIC (not APRA) administering the obligations for non-ADIs. The fact sheet states that 'appropriately adopting APRA's expectations of sound ADI lending practices for non-ADIs will ensure there is consistency between the standards applied for ADIs and non-ADIs'.

- To help address the 'excessive risk aversion' which the government considers is currently restricting the flow of credit due to overly prescriptive guidance and to enable lenders to streamline their loan approval processes, lenders will be allowed to rely on the information provided by borrowers 'unless there are reasonable grounds to suspect it is unreliable', replacing the current 'lender beware' with a 'borrower responsibility' principle.

- The fact sheet makes clear that where an application for credit is to any extent, for a business purpose, the responsible lending framework will not apply. The fact sheet states, 'Small business lending was never intended to be captured by the Credit Act, but the recent prescriptive interpretation of the obligations as well as the excessive risk aversion of lenders has meant that some small businesses have struggled to access credit, particularly where it is difficult to separate their business from their household, such as primary producers'.

- The fact sheet also states that mortgage brokers will also be exempt from responsible lending obligations, stating:

  'To ensure there is no misalignment between the obligations of mortgage brokers and lenders, following the changes, mortgage brokers will no longer be subject to RLOs; however, consumers will continue to be protected when accessing services by mortgage brokers through the recently introduced best interest duty for mortgage brokers commencing 1 January 2021'.

Proposed timing: subject to the passage of legislation, the proposed date on which these changes will apply is 1 March 2021.

[Note: In his final report, Commissioner Hayne recommended (Recommendation 1.1) against altering the obligation to assess unsuitability under the National Credit Act. His Honour also appeared to support the 'lender beware' principle suggesting (though not recommending) that the law should be altered should 'court processes reveal some deficiency in the law's requirements to make reasonable inquiries about, and verify the consumer's financial situation'. See: Financial Services Royal Commission Final Report, Volume 1 at p57].

New obligations: Small Amount Credit Contracts (SACCs) and Consumer Leases

To 'limit consumer harm' while maintaining access to small amount credit contracts (SACCs) and consumer leases for those needing to access this form of credit, the government plans to implement the following two measures.

1. Impose a cap on the total payments that can be made under a consumer lease: This new cap will be equal to the sum of the base price of the good hired under the lease , permitted delivery fees and permitted installation fees multiplied by 4% per month (up to a maximum of 48 months). Lessors will additionally be able to charge a one-off establishment fee of 20% of the good's base price.
2. Introduce new 'protected earnings amounts' for SACCs and consumer leases to protect the most vulnerable consumers: The government proposes to ban SACC providers and consumer lessors from providing a SACC or lease where doing so would exceed a certain percentage of a welfare recipient's income.

Proposed timing: Subject to the passage of legislation, the proposed changes will take effect six months after the passage of the legislation.

New licensing obligations for debt management firms

The government proposes to amend the Credit Regulations to require debt management firms representing consumers in internal and external dispute resolution processes to hold an Australian credit licence and to meet the ongoing obligations imposed on credit licensees eg the requirement to meet the 'fit and proper person' test and to undertake their activities 'efficiently, honestly and fairly'.

This reform will enable consumers involved in a dispute with a debt management firm representative to have access to the Australian Financial Complaints Authority (AFCA) to resolve the dispute.

Proposed timing: The proposed commencement date is 1 April 2021.

[Sources: Treasurer Josh Frydenberg media release 25/09/2020; Consumer credit reform fact sheet]

Initial Response

- Westpac has issued a statement welcoming the proposed changes. Westpac CEO, Peter King commented that the proposed changes 'strike a good balance' between reducing the regulatory burden on credit providers while ensuring 'rigorous credit processes' remain in place. Mr King also commented that the changes will enable lenders to speed up approval processes.
- The Australian Banking Association (ABA) has issued a statement welcoming the changes on the basis that they will remove 'duplication and overlap between regulators while continuing to ensure strong protections for consumers' including further protections for customers accessing small amount credit contracts and consumer leases. Australian Banking Association CEO Anna Bligh said that banks 'look forward to working with the Government to ensure the legislation works for both customers and the broader economy.'

- Consumer groups have raised concerns: Consumer groups CHOICE, the Consumer Action Law Centre, Financial Counselling Australia and the Financial Rights Legal Centre have issued a statement raising concerns about the impact of the proposed changes on consumers, and more particularly the potential for the changes to enable consumers to take on more debt with fewer protections. The 'government's proposed reforms will remove bank responsibility to customers, opening up new opportunities for banks to aggressively sell debt' the statement reads. CEO of Financial Counselling Australia Fiona Guthrie comments, 'As we learnt to our cost during the GFC, weaker lending standards mean people will be loaded up with as much debt as possible. There is significant profit to be made in pushing borrowers to the edge. Removing responsible lending obligations will free banks up to aggressively push credit onto their customers.'

[Sources: Westpac media release 25/09/2020; ABA media release 25/09/2020; CHOICE media release 25/09/2020]

Related News

New temporary 'targeted' relief from responsible lending obligations: The National Consumer Credit Protection Amendment (Responsible Lending Obligations) regulations 2020 commenced on 3 October.

The regulations provide six month relief from responsible lending obligations in relation to new credit, credit limit increases, variations and restructure, suggestions to remain in credit contracts and the lease of consumer goods where the consumer applying for credit is a person who operates a small business and the credit/leased goods are in part to be used for business purposes.

[Sources: National Consumer Credit Protection Amendment (Responsible Lending Obligations) Regulations 2020; Explanatory Statement]

Responsible lending (car finance) action settled

Context: The Australian Securities and Investments Commission (ASIC) commenced proceedings in the Federal Court against car financier Volkswagen Financial Services Australia Pty Limited (VWFSA) in December 2019 in connection with 49,380 loan contracts which ASIC alleged contravened responsible lending obligations under the National Consumer Credit Protection Act 2009 (Cth) (National Credit Act. ASIC asked that the court make declarations of contravention and impose a civil penalty.

Settlement reached: On 12 October, ASIC announced that it had discontinued proceedings against VWFSA having accepted a court enforceable undertaking (here) that provides that VWFSA will:

- implement a consumer remediation program which will provide an estimated $4.7 million in redress to approximately 1,800 consumers.
- engage an independent consultant to review and confirm the number of eligible consumers, assist in the design and development of the remediation program and assist in reporting to ASIC on the program.
- proactively contact consumers who entered into a consumer loan with VWFSA between 1 July 2012 and 30 April 2017 and meet eligibility criteria set out in the CEU.

The Court Enforceable Undertaking also acknowledges 'ASIC's concerns in respect of VWFSA's lending practices over the period 1 July 2012 to 30 April 2017'.

[Source: ASIC media release 12/10/2020]

2020 Federal Budget: Four point 'Your Future Your Super' reform package announced

The Federal Budget included plans to implement a four point 'Your Future Your Super' reform package which the government says will benefit Australians by $17.9 billion over the next 10 years.

Announcing the package Assistant Minister for Superannuation, Financial Services and Financial Technology Jane Hume said that the package builds on the government's work to 'modernise' and improve the superannuation system.

Four point reform package

Broadly, the package is made up of four measures which are outlined in a fact sheet here.

1. Superannuation accounts will follow (be 'stapled' to) employees

- To address the issue of multiple accounts, employers will be required to pay superannuation contributions into new employees' existing superannuation accounts.
- Where an employee is new to the workforce and does not have an existing superannuation account and does not nominate a preferred fund, employers will pay the employees' superannuation contributions into their nominated default superannuation fund.

Proposed timing/implementation: The government intends to introduce this change in two phases:

- From 1 July 2021, employers will no longer automatically create a new superannuation account in their chosen default fund for new employees but rather make contributions into employees existing superannuation accounts. Where employees do not provide their employer with their superannuation account information, employers will be required to obtain the information from the ATO.
- From 1 July 2022, the ATO will enable digital software providers to give employers the option to automate the communications between the employer's payroll system and the ATO system removing the need for employers to manually enter into their payroll system their employees' superannuation fund details.

The government states that the introduction of 'stapled' accounts will implement Recommendation 3.5 of the Hayne Commission and Recommendation 1 of the Productivity Commission Superannuation Inquiry.

2. Establishment of a new YourSuper comparison tool

A new comparison tool enabling employees to compare the performance/costs of different superannuation funds will be established.

Proposed timing/implementation: The new comparison tool will be in place by 1 July 2021. The tool is expected to: a) provide a table of 'simple super products (MySuper) ranked by fees and investment returns'; b) link members to superannuation fund websites where they will be able to choose a MySuper product; and c) display members' current superannuation accounts and prompt members to consider consolidating accounts where they have more than one.

3. Introduction of a new product performance test

- Superannuation products will be required to meet a new annual performance test (focusing on increasing returns and lowering fees charged to members).
- Products that 'persistently' fail to meet the new test (ie fail two consecutive annual tests) will be prevented from taking on new members.
- Where a product fails the test, the superannuation fund will be required to inform members and refer them to the YourSuper comparison tool to enable them to select a better performing fund should they choose to do so.

Proposed timing/implementation:

- It's proposed that MySuper products will be subject to the new annual performance test from 1 July 2021.
- Underperforming funds will be listed as underperforming on the YourSuper comparison tool until their performance improves.
- Where a product fails the test, funds will need to inform members by 1 October 2021. As part of the same communication to members, funds will also be required to provide members with information about the YourSuper comparison tool.
- The fact sheet states that 'Funds that fail two consecutive annual underperformance tests will not be permitted to accept new members until their performance improves'.
- By 1 July 2022, annual performance tests will be extended to other superannuation products.

4. Increased trustee accountability

The government plans to increase trustee accountability by strengthening trustee obligations to ensure superannuation fund actions are only undertaken in members' financial interests.

In addition, funds will be required to provide more information about their operations including 'how they manage and spend their money' ahead of annual members' meetings.

Timing/implementation: The proposed implementation date for these measures is 1 July 2021.

[Sources: Assistant Minister for Superannuation, Financial Services and Financial Technology Jane Hume media release 06/10/2020; Treasury media release 06/10/2020; Your Super Your Future fact sheet]

Initial response

In a brief statement responding to the proposed changes, **Chartered Accountants Australia and New Zealand (CA ANZ)** Superannuation Leader Tony Negline said that the stapling proposal represents a 'major shift in how the super industry has operated' since its inception. 'This is a complex change that needs to be carefully implemented to ensure that the next generation of Australians will be able to access better super outcomes' he said.

On the proposal to establish a comparison tool, Mr Negline said that CA ANZ has 'long argued that consumers need access to more comprehensive super fund information to help them work out which fund suits them best. We welcome the announcement that the government will kickstart this by ensuring detailed fund performance and fee data gathered by APRA is published and regularly updated…While it will take some years for these policies to be bedded down and for their longer terms benefits to be clear, the government's desire to require super funds to be as transparent in their reporting to members as Australian-listed companies are to their shareholders can only lead to better outcomes.'

[Source: CA ANZ media release 07/10/2020]

The Australian Institute of Superannuation Trustees (AIST) has said it has sought more detail from Treasury around the proposals, including how the new superannuation comparison tool; annual performance test and the proposal to staple members to their existing fund will operate in practice.

On the issue of stapling members to their existing funds, AIST has raised concerns that the measure could have unintended adverse consequences, in that it may result in members being stapled into underperforming funds. The AIST's position is that 'regulators, not consumers, should take responsibility for underperformance and that this needs to be dealt with before any stapling begins'.

In addition, the AIST has raised concerns about whether increased disclosure/transparency will be effective in either addressing underperformance or influencing consumer behaviour.

Finally, the AIST has concerns about the impact of the proposals on insurance coverage for workers in certain occupations.

[Source: AIST media release 08/10/2020]

APRA deputy Chair says Your Super, Your Future reforms are aligned with APRA's ongoing work

Speaking at the AIST Online Chairs Forum, Australian Prudential Regulation Authority (APRA) Deputy Chair Helen Rowell said that the Your Super, Your Future reforms announced in the Federal Budget (see above) are largely aligned with APRA's current work, though they are likely to accelerate the pace of change.

Ms Rowell commented,

> 'Although the measures are new, the direction they take the industry is not. APRA has been driving down this road for a number of years toward our goal of improving outcomes for superannuation members. And while the latest proposed changes are likely to make life uncomfortable for the trustees of a subset of

persistently underperforming funds, as Chairs, you should never forget that it is you – not APRA or the Government – that is in the driving seat when it comes to your fund's future'.

Possible changes to the MySuper heatmap

Ms Rowell said that in the 'near term' APRA will be working closely with the Government, ATO and ASIC on the detailed implementation plan of the budget measures as well as considering changes that may be needed to APRA's priorities and work plan including potential changes to the MySuper Heatmap.

Board governance

On the issue of board governance Ms Rowell flagged three key areas of focus for the regulator:

- **Board skills, composition succession planning and director tenure**: Ms Rowell commented

  'Too often we are seeing boards invoke "special circumstances" provisions to extend director tenure beyond maximum term for reasons that appear to reflect poor succession planning and management rather than genuine special circumstances. No individual is irreplaceable. Boards need to have a strong skills matrix in place and robust succession planning. APRA will continue to push all boards to ensure that use of special circumstances becomes a rare exception rather than the norm'.

- **Strategic planning and contingency planning:** Ms Rowell said that the requirements in SPS 515 are aimed at ensuring that boards are focused on the strategic direction of their fund but that in reality, 'some boards remain immature at strategic and business planning processes, and appear not to realise that doing nothing is going backwards and taking their members with them'.

  Ms Rowell cautioned that 'if these boards are failing to ask themselves the question "Would my members be better served in another fund?" we certainly will be, and will also be requiring action to move toward the exit lane. These funds will likely fail the annual outcomes assessment, however trustees that are genuinely focused on improving outcomes for their members would be acting well before that happens'.

- **Mergers and consolidation of the sector:** Ms Rowell emphasised that 'self interest has no place in the board room' especially in the context of considering merger opportunities. 'Mergers are not about maintaining jobs for current directors or deals such as "you take the Chair" and "I'll take the Deputy". These decisions need to be based on the skills and experience needed to sustainably deliver good member outcomes for the merged entity' she said. Ms Rowell said that APRA will continue to challenge and demand 'better practice' on all dimensions of merger decisions.

[Source: APRA Deputy Chair Helen Rowell - Speech to AIST Online Chairs Forum 12/10/2020]

COVID-19: So far funds have paid out $34.1bn under the government's early release of superannuation scheme, the data indicates that the number of applications coming through continues to slow

The Australian Prudential Regulation Authority (APRA) has released industry-level and fund-level data on the early release of superannuation scheme for applications received during the period 20 April (inception of the scheme) to 4 October.

- Total payments made since the inception of the scheme have taken an average of 3.3 business days to process, with 95% of payments made within five business days.
- The volume of applications continues to slow: Over the week to 4 October, superannuation funds received 31,000 applications (down from 36,000 applications the previous week).
- Of the applications received in the week to 4 October, 19,000 were initial applications bringing the total number of initial applications received to date to 3.2 million since inception of the scheme.
- 12,000 applications were repeat applications, bringing the total number of repeat applications to 1.3 million since the inception of the scheme.
- Over the week to 4 October, superannuation funds made payments to 33,000 members worth $241 million.
- Funds have made approximately 4.4 million payments since the inception of the scheme worth a total of $34.1 billion. This figure represents 98% of applications received since inception of the scheme.

[Source: APRA media release 12/10/2020]

Related News: Assistant Minister for Superannuation, Jane Hume has reportedly (Money Management; The AFR) confirmed that the government has no plans to further extend the early release of superannuation scheme on the basis that the measure was only ever intended to be temporary.

[Sources: [registration required] The AFR 08/10/2020; Money Management 08/10/2020]

APRA calls on superannuation trustees to move beyond a 'tick box' approach to implementing SPS 515

In her address to the AIST 2020 Trustee Forum Australian Prudential Regulation Authority (APRA) Deputy Chair Helen Rowell spoke about the importance of trustees ensuring that they are effectively implementing Standard SPS 515 Strategic Planning and Member Outcomes SPS 515.

- Ms Rowell observed that 'APRA's Business Performance Review (BPR) and the legislated outcomes assessment should help trustees navigate the current extraordinary health and economic crisis, while also ensuring they can deliver on their obligation to ensure their members' interests are protected into the future'.
- Ms Rowell said that despite the 'intense scrutiny' the industry is under and APRA's past and ongoing engagement with industry and with individual entities to address underperformance, 'not every trustee appears to have embraced these requirements with equal gusto'. Rather, APRA has observed that some trustees are 'approaching implementation of SPS 515 as a "tick-a-box" compliance exercise, and may not be planning appropriately for the future'.
- Ms Rowell called on trustees to move away from this 'tick a box' approach commenting that 'trustees have no excuse for not understanding what this prudential standard requires of them'. Ms Rowell suggested that APRA's prudential guide, SPG 516 Business Performance Review would be a good starting point.
- Ms Rowell also observed that, ensuring effective implementation of SPS 515 has increased in importance as a result of the pandemic commenting that,

  > 'Ensuring the effective implementation of SPS 515 has only become more critical since the outbreak of COVID-19. The financial and operational challenges created by the pandemic pose additional questions that trustees need to reflect on in fulfilling their SPS 515 requirements, and their legal duty to protect members' interests.'

Ms Rowell said that questions that trustees should be asking include:

> 'Is the board's strategy still relevant and appropriate given the dramatic shifts since the beginning of the year? For example, will changes in the membership profile of your fund require a different response, including the consideration of whether the interests of members would be better served in an alternative fund?'
>
> 'How have your financial projections been affected, and are the assumptions underpinning your projections realistic? APRA will be particularly interested in how different business models are responding, and how this has impacted trustees' ability to deliver sound outcomes for members'.

- Initial benchmarking exercise identified examples of better practice and also highlighted areas of poorer practice: Ms Rowell said that APRA's initial benchmarking assessment using the trial outcomes assessment and methodology documents provided by a sub-set of trustees (across all industry segments, and both MySuper and choice products), identified that the approach to implementation varies across industry. Ms Rowell said that the trial outcomes assessments for MySuper products were 'generally simpler and better structured than for choice products' adding that broadly outcomes assessments for choice products were 'not done well'. Ms Rowell identified several examples of better and poorer practices.
- Ms Rowell flagged that trustees should expect further engagement from their APRA supervisors as 31 December deadline for undertaking their first business performance review and the 28 February deadline for the first outcomes assessment. Ms Rowell said that APRA will publish FAQs for industry to communicate some of the key findings from its observations as to how industry has implemented SPS 515 over the 'next few months'.

[Source: APRA Deputy Chair Helen Rowell - Speech to AIST 2020 Trustee Forum 30/09/2020]

The FPA has reiterated calls for the term 'general advice' to be replaced with a more accurate descriptor in the interests of protecting consumers

The Financial Planning Association of Australia (FPA) has reiterated its support for: a) the replacement of the term 'general advice' with a different and more accurate description such as 'product information' or strategy information'; and b) for consumers to be given a warning about the nature of the advice. The FPA argues that both measures would help protect consumers from making poor financial decisions and build trust in the profession.

FPA CEO Dante De Gori CFP commented,

> 'There is a high level of confusion in the market, within industry, media, government and consumers about the definitions and roles of financial advisers and financial planners, and those that sell financial products. Further, the COVID-19 pandemic has demonstrated the value of financial advice has never been more important now that Australia is officially in recession after 29 years. In this context, we support ASIC's current project to replace the term 'general advice' with an alternative term so it is clear to consumers what is being offered– advice that does not . consider one's specific circumstances. In addition to amending the term 'general advice', where general advice is given, we recommend consumers must also be given a standard warning about the nature of the advice'.
>
> [Source: FPA media release 09/10/2020]

Targeting short term lending (again): ASIC commences proceedings in the Federal Court

The Australian Securities and Investments Commission (ASIC) has commenced proceedings in the Federal Court against Cigno Pty Ltd (Cigno) and BHF Solutions Pty Ltd (BHF Solutions).

Broadly, ASIC alleges that between 18 October 2019 and 31 March 2020 both Cigno and separately BHF Solutions engaged credit activity without holding the necessary Australian Credit Licence (ACL) in contravention of s29 of the National Credit Act.

ASIC is seeking:

- declarations of contravention of section 29 of the National Credit Act by both BHF Solutions and Cigno
- permanent and interim injunctions restraining BHF Solutions from engaging in the credit activities of being a credit provider under a credit contract and carrying on a business of providing credit
- permanent and interim injunctions restraining Cigno from engaging in the credit activities of providing a credit service and performing the obligations, or exercising the rights, of a credit provider in relation to a credit contract or proposed credit contract.

The Concise Statement and Originating Process provide further detail around ASIC's allegations and the relief sought.

Background

- In September 2019, ASIC deployed its new product intervention power for the first time to target a specific short term lending model, used by Cigno Pty Ltd (Cigno) and Gold-Silver Standard Finance Pty Ltd, MYFI Australia Pty Ltd and BHF Solutions Pty Ltd (BHFS), that it considered caused 'significant consumer detriment' to vulnerable customers.
- Cigno subsequently applied to the Federal Court for judicial review of the product intervention order, but the order was upheld (Cigno Pty Ltd v Australian Securities and Investments Commission [2020] FCA 479). Cigno filed an appeal on 13 May 2020. The Appeal is set to be heard by the Full Federal Court on 19 November 2020.
- In July, ASIC released Consultation Paper 330 (CP 330) on the proposed use of its product intervention power to address significant detriment identified in the continuing credit industry. ASIC's proposed order is here.
- ASIC has issued final guidance - RG 272 Product intervention power - outlining how it will use its product intervention power. The guidance makes clear that 'significant consumer detriment' may arise as a result of a product's inherent design features and/or consistent with the decision in Cigno Pty Ltd v Australian Securities

and Investments Commission [2020] FCA 479, as a result of the circumstances in which the product is offered (eg marketed or targeted at) consumers.

[Source: ASIC media release 30/09/2020]

APRA resumes market intervention into IDII

Following a letter to industry in December last year, the Australian Prudential Regulation Authority (APRA) has advised individual disability income insurance (IDII) providers that from 1 October 2020, they will be subject to upfront capital penalties until the regulator is assured they have taken 'adequate and timely steps' to address sustainability concerns.

Specifically, APRA requires IDII providers to implement a number of measures to better manage riskier product features, including: a) ensuring IDII benefits do not exceed the policyholder's income at the time of claim, and cease the sale of Agreed Value policies; b) avoiding offering IDII policies with fixed terms and conditions of more than five years; and c) ensuring effective controls are in place to manage the risks associated with longer benefit periods.

APRA has also asked life companies to apply these underlying principles to their other insurance products.

APRA Executive Board Member Geoff Summerhayes commented,

> 'IDII plays a valuable role in providing replacement income to policyholders when they are unable to work due to illness or injury. APRA wants to ensure it remains available to Australians who need it, but that won't happen if life companies continue to haemorrhage money through the sale of IDII. Our assessment is that the pandemic may further exacerbate the problems with this product, so decisive action can no longer be delayed. APRA has delivered a framework and financial incentives to fix this complex issue; it's now up to life companies to rise to the challenge of restoring IDII to a sustainable footing'.

[Source: APRA media release 30/09/2020; APRA letter to insurers 30/09/2020]

In Brief | LIBOR transition: The International Swaps and Derivatives Association has announced that it will launch the 2020 IBOR Fallbacks Protocol and associated Supplement to the 2006 ISDA Definitions on 23 October 2020. ASIC, with the support of the Australian Prudential Regulation Authority (APRA) and the Reserve Bank of Australia (RBA), 'strongly urges Australian institutions to adhere to the ISDA Protocol and Supplement'

[Source: APRA media release 13/10/2020]

Risk Management

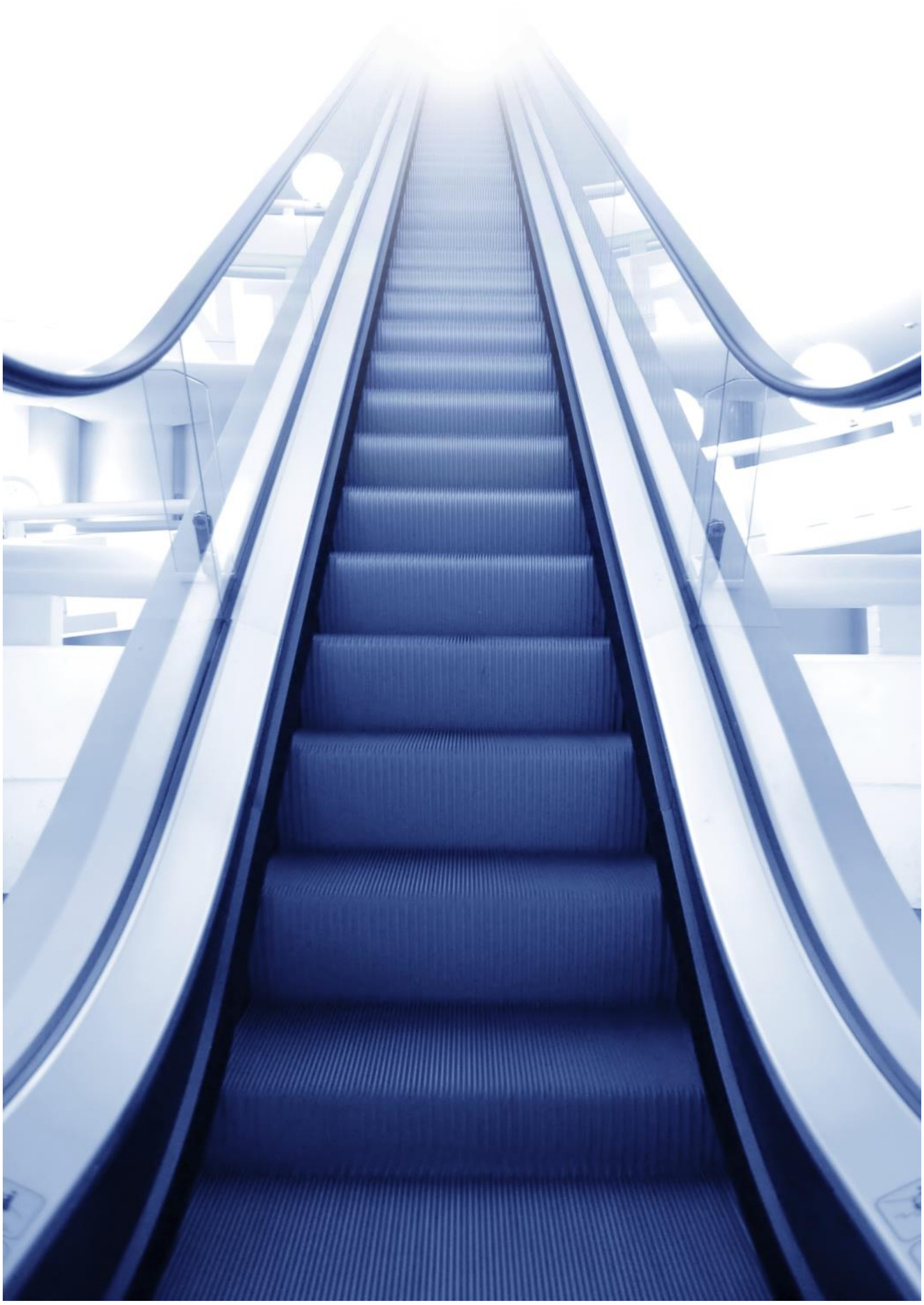
Top Story | Is competition law a roadblock to sustainability initiatives?

MinterEllison has released an article outlining how competition law concerns about collaborating with competitors can create a barrier for businesses to innovate and respond to the threats associated with climate change.

The article identifies some lessons from the regulatory response to the pandemic as well as international regulatory developments to explore the role of competition law to facilitate climate-related financial risk mitigation and adaptation and how the ACCC can help.

The article can be accessed here.

In Brief | ASIC Superannuation Senior Executive Leader Jane Eccleston has reminded superannuation trustees of their obligations to support and protect whistleblowers and implement a whistleblower policy



[Source: ASIC media release 07/10/2020]

Insolvency and Restructuring

Top Story | Insolvency Law Reforms for small business

On 24 September 2020 the Australian Government released a fact sheet 'Insolvency reforms to support small business' (Proposal) outlining proposed major reforms to corporate insolvency laws to support small business recovery following the expiry of temporary COVID-19 insolvency law relief at the end of 2020.

MinterEllison has prepared an expert summary of the key points including insights into the probable impacts for industry. The article is here.

Related News: Consultation on draft legislation to implement the reforms

On 7 October, Treasury released exposure draft legislation proposing to implement the insolvency reforms announced by the government on 24 September for a brief consultation period. Consultation closed on 12 October.

ARITA's submission 'fully supports' the proposed framework but raises concerns about implementation

The Australian Restructuring and Turnaround Association's (ARITA's) submission to the consultation 'fully supports the framework' underpinning the proposed draft Bill, commenting that 'the restructuring process and simplified liquidation reforms detailed in the Bill clearly reflect the mechanisms articulated in ARITA's 2014 thought leadership paper 'A Platform for Recovery' and adopted as key policies by ARITA since the beginning of 2015'.

However, ARITA raises several concerns about implementation including (among other issues) concerns about: the proposed timing given the 'significant challenge for the insolvency profession to be ready to undertake this type of work by the government's planned commencement date of 1 January 2021'; the drafting/construction of the proposed amendments; and concerns that the consultation does not enable industry to assess the full scope of the changes given that draft regulations and rules have not been included.

In addition, ARITA is concerned about the potential for as yet unreleased rules/regulations to create a new, 'lesser qualified' sub-category of registered liquidator.

[Sources: ARITA media releases: 07/10/2020; 13/10/2020; ARITA submission: Submission: Insolvency reforms to support small business]

In Brief | ASIC has identified that the 'significant decline' in insolvency activity continues to gain momentum: In April activity was down 33% on the same month last year, by August insolvency was down 63% on the same month in 2019

[Source: ASIC Corporate Insolvency Update - Issue 17]

Other News

Top Story | Federal Budget Highlights: 2020-21

MinterEllison's team has released an article exploring the likely impact and implications of key measures announced in the Federal Budget. The article can be accessed here.

In Brief | Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Bill 2020 passed both Houses on 9 October without amendment. The measures in the Bill include measures relating to: personal income tax cuts; temporary loss carry back; increasing the small business entity turnover threshold; the research and development tax incentive; and expensing of depreciating assets

[Sources: Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Bill 2020; Treasurer Josh Frydenberg media release 09/10/2020]

In Brief | The Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Amendment Rules 2020 were registered on 9 October and are now in force. The amendments introduce an alternative 'decline in turnover' test where companies do not have an appropriate comparison period in 2019

[Source: Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Amendment Rules 2020]

Contacts

Mark Standen
Partner

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mark.standen@minterellison.com
T +61 2 9921 4902 | **M** +61 412 104 902

Siobhan Doherty
Partner

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siobhan.doherty@minterellison.com
T +61 2 9921 4339 | **M** +61 413 187 544

Kate Hilder
Consultant

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kate.hilder@minterellison.com
T +61 2 9921 8785